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In the Supreme Court of the United States

OCTOBER TERM, 1996

STUDENT LOAN MARKETING ASSOCIATION, PETITIONER

v.

RICHARD W. RILEY, SECRETARY OF EDUCATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the statutory requirement that the federally created and regulated Student Loan Marketing Association pay an offset fee, which is used to finance an insurance fund for federally guaranteed student loans, violates the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) and its order on rehearing (Pet. App. 24-25) are reported at 104 F.3d 397. The opinion of the district court (Pet. App. 26-47) is reported at 907 F. Supp. 464.

JURISDICTION

The court of appeals entered its judgment on January 10, 1997. A petition for rehearing was granted in a clarifying order issued on March 11, 1997. Pet. App. 24-25. The petition for a writ of certiorari was filed on June 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Higher Education Act of 1965, 20 U.S.C. 1070 *et seq.*, created the federal Guaranteed Student Loan program to increase the level of financial assistance available to individuals pursuing a college education. 20 U.S.C. 1070(a).[1] Under the program, financial institutions provide students with low-interest loans, which are guaranteed by state or non-profit guaranty agencies using federal funds. Pet. App. 2-3, 27; see also 20 U.S.C. 1075(b). Those guarantees are, in turn, reinsured by the United States, through the Department of Education. Pet. App. 3, 27; see also 20 U.S.C. 1078(c).

In 1972, Congress created petitioner, the Student Loan Marketing Association, to provide greater liquidity to banks making guaranteed student loans. Pet. App. 2; see also 20 U.S.C. 1087-2. Petitioner provides financing for banks making student loans and is the largest single purchaser of student loans in the secondary market. Pet. App. 2-3; Pet. 11. Petitioner's Board of Directors is composed of seven persons appointed by the President and 14 members elected by shareholders. 20 U.S.C. 1087-2(c)(1). The President designates the Chair of the Board. *Ibid.*

In creating petitioner, Congress restricted the activities in which petitioner may engage, 20 U.S.C. 1087-2(d), and the obligations it may incur, 20 U.S.C. 1087-2(h). Congress requires petitioner to serve as

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[1] In 1992, Congress renamed the program the Federal Family Education Loan Program. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 411(a)(1), 106 Stat. 510.

a "[l]ender-of-last-resort" to students who cannot obtain financing elsewhere. 20 U.S.C. 1087-2(q). Congress also subjected petitioner's operations and financial health to the continuing oversight of Congress and the Departments of Education and the Treasury. 20 U.S.C. 1087-2(d)(1)(E), (h)(1), (j), (k), (n), and (r); Pet. App. 27-28.

Congress has deemed petitioner "an agency of the United States" for purposes of 12 U.S.C. 355(2), which permits Federal Reserve banks to purchase its obligations. 20 U.S.C. 1087-2(*l*). Petitioner's obligations are considered "obligations of the United States," so they enjoy an exemption from state and local taxes. 20 U.S.C. 1087-2(b)(2) and (*l*). Congress further exempted all stock and obligations issued by petitioner from compliance with the Securities and Exchange Commission's (SEC) registration requirements. 20 U.S.C. 1087-2(*l*). Petitioner's capitalization requirement is capped at two percent. 20 U.S.C. 1087-2(r)(4). Finally, in addition to financing petitioner's start-up costs, Congress provided petitioner with ongoing access to the Federal Financing Bank as a source of credit. 20 U.S.C. 1087-2(b)(3) and (h)(6).

By Fiscal Year 1993, the cumulative cost of student loan defaults since 1968 had risen to $21.5 billion. United States Dep't of Education, *FY 1993 Loan Programs Data Book* 68-75 (1994). Loan defaults in Fiscal Year 1993 alone amounted to $2.5 billion. *Ibid.*; see also Permanent Subcomm. on Investigations, *Abuses in Federal Student Aid Programs*, S. Rep. No. 58, 102d Cong., 1st Sess. 1 (1991). That same year, Congress amended the statutory provision under which petitioner operated to require petitioner to

pay an offset fee on all loans acquired after the amendment's effective date:

> The [Student Loan Marketing] Association shall pay to the Secretary, on a monthly basis, an offset fee calculated on an annual basis in an amount equal to 0.30 percent of the principal amount of each loan made, insured or guaranteed under this part that the Association holds * * * and that was acquired on or after August 10, 1993.

20 U.S.C. 1087-2(h)(7). Receipts generated by the offset fee are deposited into an insurance fund, which is used for payments on defaulted loans. See 20 U.S.C. 1081(a), 1087-2(h)(7)(C).

2. Petitioner filed suit seeking a declaratory judgment that the offset fee constitutes a taking of its property without just compensation, in violation of the Fifth Amendment.[2] The district court rejected petitioner's claim. Pet. App. 34-37. The court concluded that (1) the offset fee balances the benefits petitioner has received from the guaranteed student loan program with the need to finance the insurance fund that undergirds petitioner's operations; (2) the "economic impact" of the fee does not outweigh the numerous benefits that petitioner alone receives

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[2] Petitioner also asserted an equal protection claim, which the district court rejected. Pet. App. 37. Petitioner does not seek this Court's review of that claim. In addition, petitioner sought a judgment that the offset fee does not apply to "securitized" loans. (Securitized loans are loans conveyed to a separate entity, which pays the securitizing firm with the proceeds of newly issued securities backed by the transferred assets. *Id.* at 2.) The district court and court of appeals agreed with petitioner (*id.* at 12-21), and we have not sought this Court's review of that ruling.

from the government, such as state and local tax exemption, reduced interest rates, and relaxed capital requirements; and (3) the offset fee does not interfere with "reasonable 'investment-backed expectations'" because petitioner's investors were on notice that Congress could alter petitioner's federal charter at any time to impose new obligations. *Id.* at 35-37.

The court of appeals affirmed. Pet. App. 1-23. The court held that there is a "rough equivalency" between the offset fee and three benefits Congress granted petitioner in its federal charter: (1) exemption from state and local taxation, (2) exemption from SEC registration requirements, and (3) access to low-cost borrowing from the Federal Financing Bank. *Id.* at 6, 9-10. The court of appeals also reasoned that the purely prospective nature of the offset fee allowed petitioner to deploy its physical and human capital in endeavors that would not be subject to the fee. *Id.* at 12.[3]

ARGUMENT

Petitioner's takings claim does not merit this Court's review. There is no conflict in the circuits or with this Court's precedents. Petitioner does not dispute that the court of appeals applied the correct legal standard for identifying a taking under the Just Compensation Clause. Petitioner raises only a narrow challenge to how the court of appeals applied the correct legal standard to the circumstances of this particular case. That challenge, however, was

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[3] On rehearing, the court amended its opinion to clarify that it was not addressing the constitutionality of the offset fee as applied to securitized loans. Pet. App. 24-25; see note 2, *supra*.

properly rejected by the court of appeals, and it presents no question of broad or enduring importance.

a. The court of appeals' decision does not conflict with the ruling of any other court of appeals, and petitioner does not suggest otherwise. The court's ruling, in fact, accords with the resolution of similar takings claims by other courts of appeals. See *Ohio Student Loan Comm'n* v. *Cavazos*, 900 F.2d 894, 897-900 (6th Cir.) (amendment to Higher Education Act that requires state guaranty agencies to transfer their excess cash reserves to the student loan insurance fund does not effect a taking within the meaning of the Fifth Amendment), cert. denied, 498 U.S. 895 (1990); see also *Colorado* v. *Cavazos*, 962 F.2d 968, 971 (10th Cir. 1992) (citing additional cases and noting uniformity in the courts of appeals' rulings).

b. Nor does petitioner contend that the legal standard employed by the court of appeals to determine whether a taking had occurred was erroneous or in conflict with this Court's decisions. To the contrary, the court of appeals followed this Court's decision in *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989), and inquired whether the offset fee reflected a "fair approximation of the cost of benefits supplied" by the government, *id.* at 60; see also *Massachusetts* v. *United States*, 435 U.S. 444, 463 n.19 (1978). Pet. App. 6-7.

c. Petitioner instead contends (Pet. 9-16) that the court of appeals erred in balancing the benefits and burdens associated with the offset fee. Petitioner asks this Court (Pet. 9-13) simply to strike a different balance by devaluing the worth of the benefits provided by the federal government under the student loan program. That claim does not merit further review for two reasons.

First, the issue of how the court of appeals balanced a particular set of costs and benefits in a specific factual context presents no issue of broad or enduring importance meriting an exercise of this Court's certiorari jurisdiction. Petitioner identifies no other existing cases, statutes, regulations, or governmental programs that involve analogous fees or that would be affected by further review of its claim.[4] Petitioner protests at some length (Pet. 8-16) that its exemption from state and local taxes and from SEC registration requirements, and its access to the Federal Finance Bank, are not sufficiently valuable to balance the burden of the offset fee. But the district court's and court of appeals' evaluation of how much a particular congressionally conferred advantage benefits petitioner in the marketplace necessarily turns on the circumstances of the particular program, and it presents no issue of broader significance for Just Compensation Clause jurisprudence.

Second, and in any event, the court of appeals correctly concluded that the benefits petitioner enjoys as a result of its unique position within the student loan program fairly approximate the burden

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[4] Petitioner's dire warnings that the court of appeals' decision "strip[s] all federally chartered corporations of Takings Clause protection" (Pet. 9) and gives the "legislature unbridled discretion to invade the assets of the largest service providers to governmentally sponsored programs" (Pet. 13) are baseless. The court of appeals' decision turned upon no such broad generalities. Rather, the court balanced the specific cost imposed and the benefits enjoyed based on the record before it. That same calibrated, balancing test would apply to each of petitioner's hypothesized scenarios, as required by this Court's precedents. Thus, nothing in the legal standards governing Just Compensation Clause challenges changed as a result of the court of appeals' decision.

of complying with the offset fee. Indeed, petitioner does not challenge the significant value of its exemption from state and local taxation. Rather, petitioner claims (Pet. 14-15) that that benefit cannot justify the offset fee because it does not cost the federal government anything. Nothing in *Sperry*, however, makes such a distinction dispositive or even relevant. See *Sperry*, 493 U.S. at 64 (observing that the government "made available to [petitioner] sufficient *benefits* to justify the imposition of a reasonable user fee") (emphasis added). Indeed, this Court's Just Compensation Clause jurisprudence generally focuses on the economic gain or loss to the claimant, not the financial impact on the government. Cf. *United States* v. *Causby*, 328 U.S. 256, 262 n.7 (1946); *Olson* v. *United States*, 292 U.S. 246, 255-256 (1934); *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913).

Petitioner argues (Pet. 15) that, because immunity from local taxation is the norm for federally chartered corporations, it cannot suffice as a benefit that counterbalances the offset fee. That argument ignores the fact that Congress may dispense with petitioner's immunity at any time. The immunity is thus not simply a product of either custom or Supremacy Clause doctrine; it is a matter of legislative grace and, as such, was properly included in the takings calculus. Indeed, under petitioner's view that the exemption flows directly from its federal charter, petitioner can hardly deny that the charter itself has triggered a substantial benefit under federal law by bringing petitioner under the special protection of the Supremacy Clause.

Petitioner also fails to consider its access to low-cost federal financing through the Federal Finance

Bank. The ready availability of such financing reduces petitioner's credit risk, which, in turn, reduces the cost of borrowing in the private sector. See Pet. App. 10.[5] The fact that petitioner has not yet directly availed itself of that benefit (see Pet. 16-17 n.13) is beside the point. See *Sperry*, 493 U.S. at 63-64 (availability of government program considered a benefit even though not used by claimant).

Furthermore, petitioner does not deny that it benefits from the exemption from SEC registration requirements. Instead, petitioner asserts that it actually exceeds SEC disclosure requirements by choice, resulting in no savings. Pet. 16-17 n.13. As noted, actual use of a governmental benefit is not necessary. *Sperry*, 493 U.S. at 63-64. In addition, petitioner saves substantial registration fees.[6]

The final significant benefit to petitioner is participation in the guaranteed student loan program. Petitioner holds at least $34 billion in student loans (Pet. App. 5), and petitioner benefits substantially from the government's guaranty of those holdings.[7]

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[5] Petitioner primarily purchases student loans using such private financing. Pet. 3. If petitioner's cost of private financing is reduced by a scant 0.30%, the offset fee is paid for by petitioner's interest savings.

[6] The current security registration fee is approximately 0.03%. 15 U.S.C. 77f(b) and note. Because petitioner primarily raises funds through the sale of corporate debt securities (Pet. 3), that exemption alone saves petitioner ten percent of the offset fee.

[7] When the 0.30% offset fee is compared with the "high rate of default on student loans," there plainly is a reasonable basis for concluding that the benefits of the guaranty more than offset petitioner's fee. Pet. App. 7 (citing S. Rep. No. 58, *supra*, at 1) (in 1989, annual default rate was 36%).

Id. at 7-8 (petitioner is "a—perhaps the—prime beneficiary of the loan guarantee fund that the offset fee helps underwrite"). Petitioner exists only by virtue of the student loan program, and its continued vitality is contingent upon the health of that program. Cf. *Sperry*, 493 U.S. at 57 (imposition of user fee only on parties who prevailed before tribunal not a taking); *Leonard* v. *Earle*, 279 U.S. 392, 396 (1929) (seizure of 10% of packer's oyster shells permissible when shells were used to reseed oyster beds for the benefit of the packing business); *Village of Norwood* v. *Baker*, 172 U.S. 269, 278-279 (1898) (special assessment for road construction imposed on abutting property owners permissible due to the "special or peculiar benefits accruing" to them and the lack of a "substantial" disparity between the assessment amount and the benefits received).

Petitioner contends (Pet. 10-12) that the benefits of the federal guarantee are so "widely distributed" that imposing the fee only on petitioner is "arbitrary and irrational." That argument ignores, however, that the benefits created by petitioner's charter leave it able to compete for student loan holdings at a lower cost than its competitors. See Pet. App. 10 (noting petitioner's "special relationship to the market for student loans").

Moreover, contrary to petitioner's assertion (Pet. 4-5, 10-11), the purpose of the offset fee was not to solve a budget crisis at the expense of petitioner. Congress simultaneously made numerous changes to the Higher Education Act in order to spread program costs among all participants. Congress (1) created a direct student loan program to reduce "front end" costs paid to for-profit participants in the guaranteed student loan program; (2) added a user fee of 0.50% to

all lenders; (3) eliminated a floor on the yield received by lenders on loans made with tax-exempt bonds; (4) reduced student fees received by guaranty agencies; (5) added a fee for holders of consolidated loans; (6) reduced the guaranty and reinsurance commitment of the federal government; (7) required parent borrowers to receive loans in multiple disbursements; (8) lowered the amount of collections on defaulted loans that could be retained by guaranty agencies; (9) reduced the interest rate bonuses paid to lenders while the borrower is in school; and (10) required States to share default costs. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §§ 4001-4201, 107 Stat. 340-371; see also 139 Cong. Rec. H6158 (daily ed. Aug. 5, 1993) (statement of Rep. Ford); H.R. Rep. No. 111, 103d Cong., 1st Sess. 106-107 (1993); *Ohio Student Loan Comm'n*, 900 F.2d at 896-898 (discussing prior legislation that imposed financial burden on guaranty agencies to finance insurance fund).

Given the fees and cost-sharing obligations meted out among States, students, original lenders, guaranty agencies, for-profit participants, and holders of consolidated loans, petitioner errs in claiming (*e.g.*, Pet. 9) that it was singled out in Congress's effort to increase the financial soundness of the student loan program. See *Sperry*, 493 U.S. at 60, 61 n.7 (Fifth Amendment does not impose any "exacting requirement" that user fee be "precisely calibrated"); see also *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993) ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve

the legislative end."); *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 227 (1986).

d. Even if petitioner's takings claim had merit, an exercise of this Court's certiorari jurisdiction would be unwarranted because recent legislation strips the claim of any continuing importance. In the Student Loan Marketing Association Reorganization Act of 1996, Congress authorized petitioner to reorganize into a private company if its shareholders approved privatization. Pub. L. No. 104-208, Div. A, Tit. VI, §§ 602-603, 110 Stat. 3009-275 to 3009-293. Petitioner's shareholders approved privatization, and the reorganization became effective August 7, 1997. "Sallie Mae Rechartering Effective Today," *Business Wire* (Aug. 8, 1997).[8] That new private company is not subject to the offset fee. Consequently, as petitioner converts its current operations to the new private company in the coming years, the court of appeals' resolution of petitioner's takings claim will be of diminishing practical import.[9]

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[8] This article is available on Westlaw in the BWIRE database.

[9] Petitioner also objects that the court of appeals' decision "sanctions the unconstitutional diversion of state and local revenues to the federal treasury" (Pet. 13) and thus "raises serious questions of federalism" (Pet. 16). Petitioner did not raise this argument below, nor was it addressed by the court of appeals. Ordinarily, "[i]t is this Court's practice to decline to review those issues neither pressed nor passed upon below." *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990) (plurality opinion); see also *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). Furthermore, it is doubtful that petitioner is in a position to protect the coffers of the States. In any event, petitioner's federalism claim is devoid of merit. See, *e.g.*, *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 425-437 (1819).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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